IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1056 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

LAXMAN @ LAKHO RAMANLAL MOCHI
Versus
STATE OF GUJARAT

Appearance:
MR Prem Singh for Mr YATIN SONI for Petitioner No. 1
Mr K C Shah, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 23/02/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.P.BUCH)

This is an appeal under sub-section (2) of Section 374 of the Code of Criminal Procedure, 1973 (for short, 'the Code'), challenging the judgment and conviction order dated 6.9.1995 recorded by the learned Addl.City Sessions Judge, Court No.15 at Ahmedabad in

Sessions Case No.76/94 under which the learned trial Judge convicted the present appellant for an offence punishable under section 302 of IPC and sentenced him to suffer R.I. for life. The appellant was further directed to pay fine of Rs.500/- and in default, he was required to undergo R.I. for three months.

2. At the same time, learned trial Judge acquitted the present appellant from an offence punishable under section 37 (1) read with section 135 of the Bombay Police Act. The facts of the case of the prosecution before the trial court may be briefly stated as follows:

The informant was working as labourer in Hathisingh Wadi situated outside Delhi Gate, Opp.Vishram Gruh, Ahmedabad. He used to go there for labour work at about 8 a.m. and used to work there upto 5.30 p.m. every day. On 24.10.1993, it was a day of Dussehra and hence he had no work there on that day and, therefore, the informant, according to his case, had gone to the said place at about 4 p.m. At that time one Batukbhai was working there. Other two labourers were also working there.

3. At about 7 p.m. the deceased and the appellant both entered the said premises. They were quarrelling. At that time, the appellant had a knife in his hand and the appellant, according to the case of the prosecution, dealt knife blows on the neck and chest of the deceased. On account of the said blows, injuries were sustained and the deceased fell on the floor and ultimately he died at the spot. The informant and Batukbhai both were frightened and, therefore, according to their case, they had run away from the spot.

4. Thereafter the police had invited him at the spot at Hathisingh Wadi and the First Information was obtained and on account of the said First Information Report Exh.8, offence was registered and further investigation was undertaken.

5. During the course of investigation, the Investigating Police Officer had drawn panchnama about the scene of the offence, inquest panchnama was drawn, dead body of the deceased was sent for post mortem to the hospital, statements of other witnesses were recorded, the appellant was arrested. As per the case of the prosecution, the appellant showed willingness to discover muddamal knife and, therefore, the muddamal knife was discovered. It was seized under discovery panchnama under section 27 of the Evidence Act. Thereafter, uncle

of the appellant produced clothes of the appellant. They were seized by the police. The clothes put on by the deceased were received from the hospital and they were also seized. At the end of the investigation, it was found that there was sufficient material against the appellant and, therefore, the appellant was charge sheeted. As the offence against the appellant punishable under section 302 of IPC was exclusively triable by the Sessions Court, the case against the appellant was committed to the Sessions Court.

6. The learned Addl.Sessions Judge, in charge of the Sessions Case, supplied police papers to the appellant. Charge was prepared and framed against the appellant. The appellant pleaded not guilty. Therefore, evidence was recorded. The prosecution has examined the following witnesses:

PW 1 Chhanaji Chibhaji Exh.7, the informant
PW 2 Dr. Alpesh A Shah Exh.9
PW 3 Upendrabhai @ Batukbhai Exh.11
PW 4 Bhagvandas NarmadshankarExh.12
PW 5 Vajidkhan Ismaluisin Exh.22
PW 6 Mansing Babaji Exh.23 Panch
PW 7 Ashokkumar Bababulal Exh.25 Panch witness
PW 8 Kanubhai Jagaji Exh.26 Panch witness
PW 9 Suryakant Narayandas Exh.29 Uncle of applnt.
PW 10 Chandrakant L Vora Exh.30 Sr.P.I.

7. On conclusion of the evidence, the trial court recorded further statement of the appellant under section 313 of the Code. Arguments were heard and at that stage, the appellant pleaded not guilty and contended that he was falsely involved in the case. After hearing, the trial court held that the prosecution has proved the case against the appellant and accordingly the trial court convicted the appellant for the aforesaid offence. After holding the appellant guilty for the aforesaid offence, the trial court heard the appellant on the quantum of sentence and, thereafter, imposed the aforesaid sentence on the appellant.

8. Feeling aggrieved by the judgment and conviction order of the trial court, the appellant has filed this appeal before this Court. It has been contended that the trial court has committed serious error in appreciation of the evidence on record. That the two eye witnesses Chhanaji Chibhaji and Upendrabhai Batukbhai were not really eye witnesses and their conduct really show that they could not be eye witnesses. This fact is lost sight of the trial court. That the trial court also committed

error in not properly considering the discovery panchnama as the said discovery panchnama was not properly proved against the appellant. That there was contradictory version between the ocular evidence and the medical opinion. That on the whole the trial court did not have sufficient material to connect the appellant with the offence and therefore, the trial court has committed error in convicting the appellant. The appellant has, therefore, contended that the judgment and the conviction order against the appellant are illegal and deserve to be set aside. The appellant has, therefore, prayed that the appeal be allowed, the judgment and the conviction order be quashed and set aside, the appellant be acquitted of the aforesaid offence and he be set at liberty forthwith.

9. On receiving the appeal, it was admitted but bail was refused. In response to the notice, Mr K C Shah, learned APP has appeared on behalf of the State. We have heard the arguments advanced by the learned Advocates for the parties. Incidently, they have taken us through the oral and documentary evidence. They have also taken us through the observations made by the trial court convicting the appellant for the aforesaid offence.

10. The above facts go to show that the incident has taken place at 7 p.m. on 24.10.1993 at Hathisingh Wadi, outside Delhi Gate and opposite Vishram Gruh, Ahmedabad. If we go through the evidence on record, it can be gathered that the dead body of the deceased was found in the said Wadi and it was taken to the Medical Officer and the Medical Officer has certified that the deceased had several injuries on his person. Post mortem note produced by him supports the version of the Medical Officer. On the strength of the version of the Medical Officer supported by panchnama Exhs. 9 and 10 it is extremely clear that the deceased died of a homicidal death. This fact was not seriously disputed before the trial court and even before this Court also no serious dispute was raised. The question which remains for consideration is as to whether the deceased was murdered by the present appellant. For this purpose, the prosecution has examined the aforesaid witnesses. It would be very much necessary for us to scrutinise the evidence of the two witnesses who have been examined as eye witnesses by the prosecution. They are Chhanaji Chibhaji Exh.7 who is the informant and the second witness Upendrabhai Batukbhai Exh.11 is also said to be an eye witness.

11. Before examining the value of the aforesaid witnesses, it is required to be considered that the

witnesses normally used to go to Hathisingh Wadi for carrying out their work in the morning hours at 8 am and they used to return at 5.30 p.m. This was a routine matter and we may not seriously dispute the said position. However, on the day of the incident, it was Dussehra and, therefore, there was no work at the site. It is, therefore, required to be considered whether the informant, who is not staying in the neighbourhood would go to the place in question at 4 p.m. or at about 7 when the work was not there. Admittedly, he was a labourer but when there was no work, it was not necessary for him to go to the place in question. Therefore, the very fact that he had gone to the spot at about 4 p.m. creates doubts and the prosecution has not explained as to why this witness was required to go to the spot in question at 4 p.m. or even at 7 p.m. when the work was not going on. Even Batukbhai at Exh.11 was also a contracter working there in the said Wadi. Again, when the work was not there on account of Dussehra, his presence at the spot was not required. His presence at the spot was also not natural. It has not been explained as to why this witness had gone to the spot at odd hours on a holiday.

12. The prosecution has not explained as to whether these two persons used to be present in past at the spot when work was not there. The entire case of the defence is that these two persons were not present at the spot and when the eye witnesses were not present at the spot, there is no other evidence against the appellant.

13. Then, we can come to the evidence of PW 1 Chhanaji Chibhaji Exh.7 and PW 3 Batukbhai Exh.11. Both these witnesses have deposed before the trial court that the appellant and the deceased both had gone to the Wadi, they were both quarrelling and at that time, the appellant dealt knife blow on the person of the deceased and the deceased died on the spot. The two witnesses are unanimous on their versions. There is no serious contradiction between the evidence of the two witnesses on this aspect of the case.

13.1. Then they were consistent on the point that as soon as the deceased fell on the floor, both these witnesses had run away from the place of the incident. There is no dispute that both have corroborated one another on this part of their evidence.

13.2. Then it is a matter of record that so far as informant Chhanaji Chibhaji Exh.7 is concerned, he has very clearly deposed before the trial court that he had gone to the residence and he reached the house at 7.30

p.m. He has further deposed that because of the incident, he was frightened and he had run away. He has also deposed that he has was staying in Madhavpura area and that he had seen traffic police on the road. That he had also seen police vehicles with wireless facility near Delhi gate. He has further seen so many traffic police personnel at the said place. However, he has deposed that he had not conveyed the aforesaid incident to those police personnel as he was frightened.

13.3. However, he has further deposed that at about 9.30 p.m. the police had invited him. Therefore, he went to Hathisingh Wadi and, there his FIR was recorded. He has also stated in para 5 of his evidence that he reached his residence at 7.30 p.m. and at about 9.30 p.m. police had arrived there at his residence and he was told to go to Hathisingh Wadi.

14. Here we get evidence of Police Inspector Chandrakant L Vora at Exh.30. He has deposed that he had received an anonymous telephonic message on 24.10.93 saying that the deceased was killed and his dead body was lying in Hathisingh Wadi. Therefore, he went to the spot. The first information produced by the aforesaid informant at Exh.7 also shows that the appellant had left the spot after the aforesaid occurrence of the incident. However, the Police Inspector has not deposed as to how he came to know that the informant was an eye witness to the aforesaid incident. It is no doubt clear from the evidence of the informant that the police had invited him from his residence. However, the above aspect remained unexplained on record. If the Police Inspector had no intimation or information that the informant was an eye witness, then he had no reason to call him from his residence. This important link is missing and the prosecution has not tried to explain the said omission.

15. Incidently even Batukbhai Exh.11 has also deposed that he had also run away from the place after the occurrence of the incident as he was also frightened. It is significant to note that as per the evidence of Batukbhai Exh.11, he is residing in the same compound. He has further deposed that he had run away to his residence. Now if he had gone to his residence and if his residence is situated in the same compound, then the Police Inspector Mr Vora could have contracted him on the spot without any difficulty. However, his statement was recorded on the next day.

16. With a view to explain this position, the witness has changed his version during the course of his cross

examination. There he has deposed that he was frightened and therefore, he had hired a rickshaw and had gone to the place of his father-in-law, which is situated little away from Ramol. This also shows that Batukbhai has given two different versions during his examination. In the chief examination he has stated that he was residing in Hathisingh Wadi itself but in cross examinaion he has deposed that he had gone to his father-in-law's house which is situated little away from Ramol. Any way, the fact that these two witnesses had run away after the occurrence of the incident creates great doubt in their testimonies. It is moreso, when the Police Inspector has not explained as to on what basis he had called the informant to the spot for taking his FIR.

17. It is true that FIR Exh.8 supports the case of the prosecution and the case of the other witness. But at the same time, it is also required to be considered that before recording the FIR, the police had information that the deceased was killed in Hathisingh Wadi. Thereafter the police had gone to the spot and had found the deadbody of the deceased lying in the said Wadi. Therefore, the entire cognizable offence was disclosed to the police and therefore, it cannot be said that the police started investigation on the basis of FIR Exh.8 filed by informant Exh.7. Therefore, it would be difficult to technically treat the FIR Exh.8 as FIR. Therefore, it would not be possible to seek corroboration from the FIR Exh.8 to the oral testimony of informant Exh.7. In view of the above position, considering the conduct of the so-called two eye witnesses, it would not be possible to rely upon their evidence in view of the fact that the informant had not contacted anyone including the police while going to his residence. Even after reaching the residence, he had not disclosed the said fact to anybody at any point of time before filing of FIR Exh.8. Looking to the above conduct of PW 1 Chhanaji Chibhaji and Batukbhai, Exh.7 and 11 respectively, it is doubtful whether these two witnesses were really eye witnesses. Therefore, their evidence is not free from doubt.

18. Then, there is evidence of panchnama which is shown to be a discovery panchnama produced on record. In this aspect, we have the evidence of two panch witnesses, Bhagvandas Narmadashankar at Exh.12 and Ashok kumar Babulal Shah, Exh.25. The panchnama has been produced at Exh.13. So far as the first panch witness is concerned, he is a panch witness to the said panchnama. He has not deposed before the trial court that the appellant had made some statement showing his willingness to discover

the muddamal knife. He has not been treated hostile. Though the above fact was not disclosed during the course of the chief examination, no effort was made to put any question to the said witness as to whether any statement was made by the appellant showing his willingness to discover muddamal knife. Therefore, a statement said to have been made by the appellant for the discovery of muddamal knife has not been established through the evidence of this witness. Same is the case of co-panch Ashok kumar Babulal Shah, Exh.25. There he has deposed that the police had told the panch that the appellant wanted to show something and therefore, they were required to go with the appellant. The witness has not deposed that the appellant had made a statement showing his willingness to discover the muddamal knife. Though the witness has not been treated as hostile, no effort has been made to bring it on the record of the trial court through his evidence to the effect that some statement was made by the appellant before the witness before going to discover the knife.

19. It is true that Police Inspector Mr Vora at Exh.30 has deposed before the trial court that the appellant had shown willingness to discover muddamal knife. At the same time, the two panch witnesses have not supported the prosecution on the said point. It is true that the witnesses may not support the prosecution and yet the prosecution may not depend upon the evidence of the Police Inspector. Here the facts are different. Two panch witnesses have not said anything about the said statement said to have been made by the appellant before the witnesses and before the Investigating Police Officer which is required to be made in view of the provisions made under section 27 of the Evidence Act. At the same time, these witnesses have not been treated hostile and no effort has been made by the prosecution to bring the same on record through their evidence. Therefore, it would not be open to the prosecution to now argue that the Court should depend on the oral testimony of Police Inspector Mr Vora at Exh.30, though the said fact has not been deposed by panch witness Exh.12 and PW 7 Ashok kumar Shah at Exh.25. Any way, it is not proved on record that the appellant had made a statement in presence of the panch witnesses saying that he was willing to discover the muddamal article from a particular place.

20. In this connection, we can refer to a latest pronouncement of Hon'ble Supreme Court in the case of Anter Singh v. State of Rajasthan, reported in 2004 AIR SCW 743. Incidently, the said decision appears to have been pronounced on 5.2.2004. There the Hon'ble Supreme

Court has laid down condition necessary for bringing section 27 of the Evidence Act, 1872 in operation. It would be worthwhile to refer to the relevant para from the said decision as under:

"The expression 'provided that' together with the phrase 'whether it amounts to a confession or not' in section 27 show that the section is in the nature of an exception to the preceding provisions particularly sections 25 and 26. The first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctly' means 'directly', 'indubitably', 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly' relates 'to the fact thereby discovered' and is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered. The various requirements of the section can be summed up as follows: (1) The fact of which evidence is sought to be given must be relevant with question of relevancy. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancy of other evidence connecting it with the crime in order to make the facts discovered admissible. (2) The fact must have been discovered. (3) The discovery must

> have been in consequence of some information received from the accused and not by accused's own act. (4) The persons giving the information must be accused of any offence. (5) He must be in the custody of a police officer. (6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to (7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

21. In the present case, we find that the act that a statement was made by the appellant before the Investigating Police Officer in presence of panch witness, has not been established by the prosecution and, therefore, in absence of such willingness demonstrated by the appellant, panchnama could not fall within the four corners of section 24 of the Evidence Act. It is also required to be considered that so far as the first witness is concerned, he has deposed that the police took them to Subhash Bridge in a police jeep whereas the co-panch has not deposed the said fact before the trial court. Any way, the statement which is required to be made by the appellant showing his willingness to show the muddamal article has not come on record and there is no satisfactory evidence that the appellant had made such a statement to the appellant in presence of panch witnesses. In absence of a satisfactory evidence on the same, it would be difficult to believe panchnama Exh.13 as discovery panchnama under section 27 of the Evidence Act.

22. Then according to the case of the prosecution, clothes of the appellant were seized by the Investigating Police Officer and that is a material circumstance against the appellant. Now if we go through the evidence on record, it is very clear from the evidence of PW 8 Kanubhai Jagaji Exh.26 that the uncle of the appellant has produced clothes of the deceased before the police and they were seized. If we go through the evidence of this witness, it would reveal that the police had shown clothes to the witnesses and they were seized by the police. The witness has not deposed before the trial court at exh.26 that these clothes were produced by the uncle of the appellant. Therefore, the contents of panchnama Exh.27 have not been proved through the evidence of this panch witness. Then the prosecution has examined PW 9 Suryakant Narayandas Exh.29. He is the uncle of the appellant. According to the case of the prosecution, the muddamal clothes were produced by him

before the police. This witness has turned hostile and he has denied the fact that he had produced the clothes before the police.

23. Apart from the said fact it is not on record that the clothes which were seized by the police as clothes of the appellant were really put on by the appellant at the time when the offence was committed. Unless the said fact is proved on record, the fact that the clothes of the appellant were seized by the police would be useless.

24. The prosecution has also examined PW 5 Vajidkhan Ismailusin Exh.22. He has deposed that he had tried to contact the police on phone but he could not and thereafter he made another phone call to the police and thereafter the police arrived at the spot. Even Police Inspector Mr Vora Exh.30 has supported the said version of PW 5 at Exh.22. However, if the police had received this telephonic message from PW 5, Vajidkhan Ismaluisin, Exh.22, them some entry must have been posted in the station diary as the information related to the case of murder. However, the said police station diary does not appear to have been produced on record. Therefore, it is not on record as to what was the information received by Police Inspector Mr Vora Exh.30. Any way, it is required to be considered here that even according to the evidence of PW 5 Vajidkhan Ismaluisin Exh.22, he had received the information at about 9.30 p.m. at his residence. At that time, according to the evidence of this witness, Shanku Maharaj and Mukundbhai Patel were at his residence and they were told that Police Constable Dilipsinh Chauhan was killed by the appellant. Thereafter all of them had gone to Hathisingh Wadi. There they found that the deceased was lying dead and thereafter, he contacted the police as aforesaid. Shanku Maharaj and Mukundbhai Patel have not been examined on the point as to how and why these people came to know about the incident. If they were eye witnesses, the prosecution should have examined them. If they were not examined and their evidence was not recorded, evidence of PW 5 at Exh.22 would not be very much material for the just decision in the case.

25. PW 6, Mansing Babaji Exh.23 is a panch witness. Panchnama of scene of offence is at Exh.24. It seems that the police had seized blood stained earth and said hand kerchief from the spot. But it is not on record that the said hand kerchief belonged to the appellant and hence the evidence at Exh.24 does not connect the appellant with the crime.

26. Then it is also required to be considered that the Medical Officer has given his opinion about the injuries sustained by the deceased and the weapon used in the offence. Dr. Alpesh Shah Exh.9 has undertaken the post mortem in respect of the dead body of the deceased on 25.10.1993 at morning hours. At the time when he had examined the dead body of the deceased, he could notice that the deceased had suffered not less than 16 injuries on his person. Then, his opinion was sought about the nature of injuries and the weapon used for the commission of the said offence. He has clearly deposed in chief examination that these injuries are possible by sharp cutting instrument. He also deposed that on seeing the muddamal knife Article 16, he was able to say that except the stab injuries, other injuries were possible by muddamal knife article 16. This means that the stab injuries were not possible my means of muddamal article 16. Then he has further deposed that all the injuries were collectively sufficient in ordinary course to cause the death of the deceased. He has further deposed that the external injuries No. 1,4,5,9 and 10 were individually sufficient, in the ordinary course of nature, to cause the death of the deceased. By and large, these are stab injuries which would not be caused by the muddamal article. In his cross examination, he has deposed that looking to the injury received by the deceased, the weapon used must be having the edge on one side and must be blunt on the other side. Looking to the above evidence of this witness, it is crystal clear that the fatal injuries were not possible to be caused by muddamal knife article 16.

27. If some injuries were possible by muddamal knife and some were not possible, then naturally, inference would be either that there could be two different weapons used by one person for causing injuries on the person injured or that two different persons were present with two different weapons and they both might have caused the injuries to the deceased'. Looking to the above medical evidence, two probabilities are required to be explained by the prosecution. In the present case, we find that despite the evidence of the Medical Officer, the prosecution has not tried to explain the above infirmity in the evidence on record. If some of the 16 injuries were particularly fatal injuries which were not possible by muddamal knife and if some injuries were possible by muddamal knife, the prosecution is required to explain how the remaining injuries not possible to be caused by muddamal knife came to be found on the person of the deceased. This material infirmity has not been explained by the prosecution to any extent.

28. So, we find that the presence of two so-called eye witnesses who have been examined is not free from doubt. Their conduct shows that their evidence is not natural and their presence and their evidence about their presence at the spot is not free from doubt. It is required to be considered that both have deposed that the deceased had sustained knife blow at the hands of the appellant on the chest and neck. However, the injuries were found even on the back and thigh which also shows that these injuries have not been explained by the eye witnesses. Even if we take it that the eye witnesses may not have been able to see those injuries minutely, even the injury on the back of the deceased could be seen by them. Then also the fact remains that even their presence at the spot is not free from doubt. As aforesaid, their conduct soon after the incident is also not free from doubt. In such cases, ordinarily, the police would be contacted and even if the people do not contact the police immediately, then also they would inform the police little late at least when the police is found on their way to their residence. Especially the informant had every opportunity to convey the episode to the police on several occasions while on way to his residence. He has not informed any police officer about the episode in question. He has also informed any one at the residence about the episode in question. Considering the above fact situation, the presence of the above witnesses is not found to be free from doubt and once it is found that the presence of these two witnesses doubtful, then there is no other evidence on record to connect the appellant with the crime.

29. In above view of the matter, Mr Prem Singh, learned Advocate for the appellant is right while arguing that the evidence of the two eye witnesses is doubtful and when the evidence of the two eye witnesses is found to be doubtful, then there being no other witness to the crime, the appellant should be extended the benefit of reasonable doubt.

30. In above view of the matter, the trial court has not appreciated the aforesaid aspect of the case while dealing with the case of the prosecution. The trial court has also not considered the above conduct of the above two witnesses. The trial court has also not considered as to how the Investigating Police Officer came to know, while inviting the informant from his residence, that he was an eye witness and he would be able to give version about the episode in question. The trial court has also not considered the conduct of

Batukbhai, who had once deposed that he had gone to his residence and then he changed his version that he had gone to the residence of his father-in-law. The trial court has also not considered the fact that eye witness Batukbhai was residing in the compound of Hathisingh Wadi itself where the offence was committed. In ordinary course of nature, the Police Inspector would have tried to gather material from the compound itself. Had it been done, then, Batukbhai would have been the first witness contactable on the spot. The Police Inspector has not contacted Batukbhai at the first instance and it is not the case of the Police Inspector that Batukbhai was not available at his residence on that day when enquiry was made there. These aspects have not been properly appreciated by the trial court. Even the fact that as per the medical evidence, fatal injuries were not possible by the muddamal knife Article 16. Moreover, the medical opinion also shows that some injuries were possible by muddamal knife and most of the fatal injuries were not possible by muddamal knife. These aspects required consideration and in our opinion, the trial court has lost sight of the above inconsistencies and infirmities in the evidence of prosecution. We also find that the trial court has also not properly considered that the discovery panchnama has not been properly proved by the prosecution though the witnesses examined as panch witnesses have not been treated hostile. Even the evidence of production of muddamal clothes of the appellant did not lead to any particular conclusion in absence of any evidence on record to prove that those clothes were put on by the appellant at the time when the offence was committed. We are of the considered opinion that the trial court has committed error in not properly appreciating the aforesaid aspects. However, with the help of the learned Advocate for the appellant and the learned APP, we were required to go through every piece of evidence on record and on going through the evidence with their help and on reappreciation of the same, we are of the considered opinion that the prosecution has not proved the case against the appellant beyond any reasonable doubt and therefore, considering the aforesaid infirmities on record, the trial court ought to have granted benefit of reasonable doubt to the appellant. By not appreciating the case in the aforesaid manner, the trial court has committed illegality and, therefore, it becomes our duty to interfere with the said judgment and conviction order of the trial court. It is also required to be considered that once the evidence of the two eye witnesses is ignored, there is absolutely no material on record to connect the appellant with the crime. This aspect was also required to be seriously and properly

considered by the trial court which has not been done unfortunately. In above view of the matter, we are of the opinion that the judgment and conviction order recorded by the trial court are not legal and proper and they are required to be set aside.

31. For the foregoing reasons, this appeal is allowed. The judgment and conviction order recorded by the trial court are set aside. The appellant herein is found not guilty for the offence punishable under section 302 of IPC and he is ordered to be acquitted of the said offence. The appellant is in jail. Therefore, he is ordered to be set at liberty forthwith, if not required in any other case.

[D K Trivedi, J.]

[D P Buch, J.]

msp